



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-99-06

FACTS:

As Counsel to a town in Massachusetts ("Town") you have requested an advisory opinion on behalf of members of the Review Board ("RB"). The Town established the RB "in recognition of the fact that beautiful communities can be created only through a deliberate search for beauty on the part of the community leadership, architects, engineers, planners, realtors and the building industry, backed by an appreciation of the visual world by the people." Town By-Law.

The RB consists of five members, appointed by the Board of Selectmen for three year terms, one of whom must be a registered architect and one of whom must be a registered engineer or registered land surveyor. *Id.*

According to Town By-Laws, the Planning Board ("Planning Board"), the Zoning Board of Appeals ("ZBA") and/or the Building Commissioner ("Building Commissioner") are required to forward all landscape plans for buildings in Business, Industrial or Multifamily Dwelling Zones to the RB. The RB must review the landscape plans and make recommendations to the appropriate board within 14 days. The Planning Board and the ZBA have discretion to incorporate RB recommendations as conditions for approval. *Id.*

Town By-Laws require the RB to evaluate landscape plans in relation to existing and proposed landscape and buildings. The Town Manual ("Manual")^{1/} requires the RB to evaluate landscape plans (proposed trees, plants, paving, benches, fencing, screening, lights, fountains, terracing, signs, stones, planters, parking areas and foundation treatment) in light of the following factors: conformity with Town By-Laws governing site development set-backs, screening, parking, and buffer zones; conjunction with contiguous adjacent property, street rights-of-way, and existing or proposed buildings; visual harmony with the surroundings; environmental impact; enhancement of the character, value and attractiveness of the surroundings through design, scale and location; character of the existing landscape to be preserved; and, preservation of existing stands of trees.

In practice, and based on the Manual, the RB operates as follows: an applicant who applies to the Building Commissioner for a building permit ("permit") in a business, industrial or multifamily dwelling zone is instructed to provide two copies of a landscape plan ("plan") to the RB; the RB evaluates the plan in accordance with the factors listed above and meets with the applicant to reach agreement on modifications the RB recommends; once agreement is reached, the RB and the applicant sign two plans; the RB maintains one copy and forwards the other to the Building Commissioner; the RB approves the issuance of the permit; the RB Chairman signs the Building Permit Application Sign-On Sheet^{2/} ("Sign-On Sheet"); when the work is completed, the RB (or a majority of the RB) does a site inspection, followed by the RB Chairman's signing the Building Commissioner's Sign-Off Sheet ("Sign-Off Sheet").^{3/}

QUESTIONS:

1. May an RB member be compensated by a private client for landscape work implementing a plan the RB member reviewed if, at the time of the review, the RB member had no foreseeable expectation of performing such work?

2. May an RB member who does not participate in a review of the plan or inspection of the work be compensated by a private client for landscape work done pursuant to the plan?

ANSWERS:

1. No, an RB member may not be compensated by a private client to implement a plan the RB member reviewed because such compensation would be in relation to a particular matter of direct and substantial interest to the Town and one in which the RB member participated.

2. No, an RB member may not be compensated by a private client for landscape work done pursuant to the plan, even if the RB member does not participate in the review or inspection of the work, because the RB member has official responsibility for review of the plan, approval of the issuance of a building permit, and inspection of the work.

DISCUSSION:

RB members are individuals performing services for a municipal agency,^{4/} and, as such, are considered municipal employees subject to the conflict of interest law.^{5/} G.L. c. 268A, § 1(g). Town records show that RB members have been classified as special municipal employees.^{6/} As municipal employees, RB members are subject to § 17 of the conflict of interest statute.^{7/} Section 17(a) provides that no municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation^{8/} from anyone other than the city or town or municipal agency in relation to any particular matter^{9/} in which the same city or town is a party or has a direct and substantial interest. This section, which is designed to prohibit divided loyalties, applies when a public employee, who is expected to demonstrate undivided loyalty to the public interest, represents the interests of an “outsider” in a matter to which the public is a party or has a direct and substantial interest. See W.G. Buss, *The Massachusetts Conflict-Of-Interest Statute: An Analysis*, 45 B.U. Law Rev. 299, 322 (1965).

The prohibitions of § 17 are less restrictive in the case of a special municipal employee, such as an RB member. A special municipal employee may receive compensation from anyone other than his municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest, provided that the particular matter is not one (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving.^{10/}

The first question is whether an RB member may be compensated for private work implementing a plan he reviewed, assuming he had no foreseeable expectation of performing such work at the time of the review.^{11/} The answer turns on whether such compensation is in relation to a particular matter of direct and substantial interest to the Town and in which the RB member participated.

First, if the RB member reviews the plan and makes recommendations for modifications, we find that such action constitutes personal and substantial participation. See *EC-COI-92-3* (“If one discusses or makes recommendations on the merits of a matter one will be deemed to have participated personally and substantially in a matter”); see also, *EC-COI-89-2* (discussion of the merits of a particular matter). Next, the RB’s review of the plan is a particular matter of direct and substantial interest to the Town, because Town By-Laws require an applicant to submit a plan to the RB for review and the Manual requires the RB’s approval prior to the issuance of a permit. See *EC-COI-87-31* (where the Commission concluded that an application for a building permit, the decision to issue the permit, and the permit itself are all “particular matters” to which the town is a party or in which the town has a direct and substantial interest). Thus, if an RB member is later compensated to implement the plan, such compensation would be in relation to his earlier review of the plan, a particular matter in which he participated. We conclude that § 17(a) prohibits the receipt of such compensation.^{12/}

The second question is whether an RB member may be compensated by a private client for work the RB inspects if the RB member did not review the plan and will not inspect the work. Since RB members are special municipal employees, the narrow question is whether the RB member would be compensated in relation to subjects within his official responsibility. The statute defines “official responsibility” as “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.” G.L. c. 268A, § 1(i).

In determining what constitutes a public employee’s official responsibility, the Commission has cited the interpretation of federal law on which G.L. c. 268A was modeled, which provides that “the scope of an employee’s ‘official responsibility’ is determined by those areas assigned by statute, regulation, . . . job description or delegation of authority.” 5 CFR § 2637.202(b)(2); Title 18 U.S.C. § 202(b). See Buss, *supra*, at 321; *EC-COI-99-2*. We therefore look to the sources of RLRB authority and the scope of that authority.

The primary source of RB members’ official responsibility springs from Town By-Laws which *require* the Planning Board, the ZBA and the Building Commissioner to forward landscape plans to the RB for review and recommendations and *require* the RB to report back to the appropriate board. Town ByLaws also *delegate* to the RB the task of evaluating landscape plans.

The secondary source of RB members’ official responsibility comes from the Manual, which assigns to the RB a shared responsibility for community planning.^{13/} The Manual also provides the equivalent of a job description, instructing RB members on specific criteria to apply in evaluating plans, such as “[c]onformity with the Town By-Laws governing site development set-backs, screening, parking and buffer zones,” “conjunction with contiguous adjacent property, street rights-of-way, and existing or proposed buildings,” and “environmental impact.” Finally, the Manual delineates the process by which RB members exercise their authority through meeting with the applicant, maintaining a copy of approved plans, signing the Sign-On Sheet of the Building Commissioner, and performing a site inspection when the work is completed.

Official responsibility attaches as soon as the RB receives an applicant’s plan, since RB members may then exercise their authority to evaluate the plan. See Buss, *supra*, at 337 (“consistent with the meaning of the concept, [] official responsibility should attach at precisely that point of time when the official’s authority would become exercisable with respect to the application in any degree or respect”). The RB’s evaluation of the plan, approval of the

issuance of a building permit, and inspection of the completed work are all particular matters which remain subjects of RB members' official responsibility until the inspection is conducted and the RB Chairman signs the Sign-Off Sheet.^{14/} *EC-COI-88-9* ("A town always retains jurisdiction to determine that work is in accordance with the specifications stated on the application for a building permit"). As a fundamental matter, an RB member can not absolve himself of official responsibility by not participating in a particular matter but only by, "in effect, resign[ing] from his position." Buss, *supra*, at 320-321. See, e.g., *EC-COI-81-14* (member of area board had official responsibility over any particular matter before the board whether or not he participated in the matter as an area board member); *Public Enforcement Letter 96-1* (special permit site plan review was a subject of zoning board of appeals member's official responsibility even though he abstained from participating in the matter as a ZBA member).

In sum, if an RB member receives compensation to implement a plan, such compensation would be in relation to particular matters which are (or within one year have been)^{15/} subjects of his official responsibility. See *EC-COI-88-9* (§ 17 prohibits part-time town building inspector, even if a special municipal employee, from receiving compensation for carpentry services which require an application for a building permit or subsequent inspection or approval by the town, since he has official responsibility for enforcement and administration of the building code and permits issued pursuant to the code); *EC-COI-83-17* (member of Board of Underwater Archaeological Resources prohibited from receiving compensation in connection with excavation from the holder of a permit granted by the Board, since the application for a permit, the decision to grant the permit, and decisions regarding oversight of the operation all are particular matters within the Board member's official responsibility). We conclude that § 17 (a) prohibits the receipt of such compensation because the RB has official responsibility - the direct administrative and operating authority - for evaluating and approving all landscape plans in business, industrial and multifamily dwelling zones, and for inspecting the completed work implementing those plans.

DATE AUTHORIZED: November 17, 1999

^{1/}The "Town Review Board" Manual titled "Criteria and Procedural Design," bears the Town Seal and provides in its Preamble: "The design of the creation of the Town Review Board is delineated in Article [] of the Town Meeting . . . and the Board was subsequently established by the Selectmen so that aesthetic community planning could become the shared responsibility of architects, planners, engineers, realtors, town officers, as well as community leadership."

^{2/}The Sign-On Sheet provides the following: the property location, type of construction, name of owner, name of contractor; the heading: "This is to certify that the following departments have been informed of the proposed construction and do hereby approve of the issuance of a building permit"; the heading "For All Applicants," followed by a list of various Town departments and agencies with a signature line and date for each, such as "Fire Department, by ____date____"; the heading "For Business/Industrial/Business-Professional (in addition to the above)," and a list of the following boards, with a signature line and date for each: Board of Health; Board of Selectmen; Design Review Commission; Disabilities Commission; Historical Commission; and Review Board.

^{3/}You question the Building Commissioner's practice of requiring RB approval as a condition for issuing a Certificate of Occupancy (CO); however, that matter is not relevant to our analysis.

^{4/}"Municipal agency", any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, § 1(f)

^{5/}"Municipal employee", a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, § 1(g)

^{6/}“Special municipal employee”, a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a “special municipal employee” unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be “municipal employees” and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, § 1(n).

^{7/}As an initial matter, although Town By-Laws describe the RB as “not regulatory but rather advisory,” a consideration of the following factors which the Commission has previously applied to advisory committees rules out concluding that the RB is an ad hoc advisory committee whose members are not subject to the conflict law: the establishment of the RB through Town By-Laws as a permanent board; the structure and composition of the RB membership; the formality of the process by which the RB operates; the authority which the RB exercises in relation to a building permit; RB inspection of the final work. See *EC-COI-93-22* (discussion of factors the Commission considers in determining whether a particular entity is a public instrumentality for purposes of G.L. c. 268A). Moreover, the Town has expressly classified RB members as special municipal employees within the provisions of G.L. c. 268A. In the future, should the RB be redesigned to serve as an ad hoc advisory committee, you may seek additional advice.

^{8/}“Compensation”, any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, § 1(a).

^{9/}“Particular matter”, any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, § 1(k).

^{10/}Clause (c) applies only in the case of a special municipal employee who serves on more than 60 days during any period of 365 consecutive days. The application of clause (c) is not relevant to our analysis.

^{11/}Section 19 prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has arrangement concerning prospective employment, has a financial interest. G.L. c. 268A, § 19. If an RB member participates in the RB review of landscape plans at a time when he knows or has a reasonable expectation that he will perform such work, § 19 will be violated.

^{12/}An RB member may receive compensation for landscape work in Town so long as the Town does not require the RB’s review (such as for work which is not in a business, industrial or multi-family zone).

^{13/}See footnote 1, *supra*.

^{14/}If the RB did not inspect the completed work, the Town nevertheless has a direct and substantial interest in the work, since “[t]he direct and substantial interest of the [T]own is determined by the requirement of issuing a permit, and not by the practice of inspection.”

^{15/}Even if one year passed since the RB reviewed the plan, the RB still has official responsibility for inspecting the completed work.